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October 5, 1998

VIA HAND DELIVERY

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Deployment of Wireline Services Offering Advanced Telecommunications Capacity; CC Docket No. 98-147

Dear Ms. Salas:

Enclosed for filing in the above captioned matter, please find an original and four (4) copies of Opposition of Hyperion Telecommunications, Inc.

Please acknowledge receipt by date-stamping the enclosed extra copy of this filing and returning it to me in the envelope provided. If you have any questions regarding this filing please contact me at 202/424-7791.

Sincerely,

Robert V. Zener

RVZ/ta
enclosures

254259.1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

OPPOSITION OF HYPERION TELECOMMUNICATIONS, INC.

Hyperion Telecommunications, Inc. ("Hyperion") respectfully submits this opposition to the petitions for reconsideration file by SBC Communications, Inc.[1] and Bell Atlantic, Inc. of the Commission's Advanced Services Order issued in this proceeding.[2]

Hyperion is a diversified telecommunications company whose affiliates are providing or preparing to provide facilities-based local exchange service in twelve states. Hyperion, through its affiliated networks, is a leading provider of integrated local telecommunications services over state-of-the-art fiber-optic networks in selected markets in the United States. Hyperion affiliates provide services to small, medium, and large businesses, and government and educational end

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[1] Petition for Reconsideration of SBC Communications, Inc., Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell, filed September 8, 1998.

[2] Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order, CC Docket No. 98-147, FCC 98-188, released August 7, 1998 ("Advanced Services Order").

users and resellers, including IXCs. Enhanced data services currently offered by some Hyperion affiliates include frame relay, ATM data transport, business video and conferencing, private-line data interconnect service and LAN connection and monitoring services.

I. THE COMMISSION LACKS INDEPENDENT FORBEARANCE AUTHORITY UNDER SECTION 706

Petitioners interpret section 706 to confer on the Commission independent forbearance authority. Accordingly, they argue, the Commission may ignore the provision of section 10(d) forbidding the Commission from exercising its forbearance authority under section 10 to exempt LECs from complying with the open-access requirements of section 251(c) until those requirements have been fully implemented.

The Commission has already addressed this contention in considerable detail. Advanced Services Order, ¶ ¶ 69-79. The petitions raise no new arguments. There is no occasion for reconsideration.

Petitioners' interpretation of section 706 is totally implausible. Section 706 directs the Commission to encourage the deployment of advanced telecommunications capability by utilizing certain listed measures: "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." If that language were sufficient to confer independent regulatory forbearance authority sufficient to override the limitations of section 10, it would also have to be construed to confer independent authority to engage in the other regulatory measures listed: "price cap regulation," "measures that promote competition," and "other regulating methods." Moreover, consistent with petitioners' argument that the

Commission has independent authority under section 706 overriding the limitations in section 10(d) on regulatory forbearance, section 706 would have to be interpreted also to override other limitations in the Act on the Commission's authority to engage in "price cap regulation," "measures that promote competition," and "other regulating methods." That would be an astonishingly broad and sweeping delegation of authority to the Commission.

For example, petitioners' interpretation would mean that the Commission could engage in "other regulating methods" to encourage deployment of advanced telecommunications, independent of any other authority in the Act. Such a broad construction of section 706 is simply not plausible. Having written an extremely detailed statute carefully spelling out the limitations the Commission must observe in exercising its regulatory authority, Congress cannot plausibly be presumed to have swept away in one sentence all those limitations, conferring broad and essentially unlimited independent authority on the Commission whenever advanced telecommunications is involved.

Instead, it is much more plausible to interpret section 706 as a Congressional direction to the Commission to utilize its existing authorities in a manner that encourages the deployment of advanced telecommunications capability. That includes its existing authority under section 10 to engage in regulatory forbearance – subject to the limitation in section 10(d) that it may not forbear to apply the open-access requirements of section 251(c) without first finding that those requirements have been fully implemented. That is the interpretation the Commission correctly adopted, and the Commission should adhere to it

II. THE REQUIREMENT TO CONDITION LOOPS DOES NOT VIOLATE THE *IOWA UTILITIES BOARD* DECISION

1. Bell Atlantic argues that the Commission's Order violates the Eighth Circuit's order in Iowa Utilities Board v. FCC, 120 F.3d 753, 812-13 (8th Cir. 1997), cert. granted 118 S.Ct. 879 (1998) ("Iowa Utilities Board"). The Eighth Circuit set aside that portion of the Local Competition Order requiring incumbent LECs "to provide interconnection, unbundled network elements, and access to such elements at levels of quality that are superior to those levels at which the incumbent LECs provide these services to themselves, if requested to do so by competing carriers." Iowa Utilities Board, 120 F.3d at 812. The Eighth Circuit concluded that section 251(c)(3) "implicitly requires unbundled access only to an incumbent LEC's *existing* network – not to a yet unbuilt superior one." Iowa Utilities Board, 120 F.3d at 813 (emphasis in original). Petitioners argue that by requiring incumbent LECs to condition loops on request, the Commission is requiring them to provide competing carriers with access to a "yet unbuilt superior [network]."

But conditioning loops does not require the incumbent to build a superior network. Instead, the loops constitute a portion of the existing network; conditioning is nothing more than cleaning or restoration of existing loops by removal of certain equipment on the line. It is no different from, for example, removing unneeded equipment from a collocation space, or removing unneeded obstacles to access to poles or ducts. Conditioning does not require the incumbent to construct new loops or add new equipment. All the requesting carrier gets is an existing loop.

2. In the alternative, if the Commission agrees with petitioners that the "quality improvements" barred by Iowa Utilities Board apply to conditioning looops, it should make clear that the duty of incumbent LECs to provide network elements on a nondiscriminatory basis under section 251(c)(3) includes the duty to provide conditioned loops if the incumbent is providing conditioned loops to itself, or to any subsidiary or affiliate or other party, for any services anywhere on the incumbent's network. For example, even though the incumbent may not be providing conditioned loops at the particular central office which is the subject of a competing carrier's request for such loops, the incumbent's duty of non-discrimination requires it to provide such loops on request if it is already providing conditioned loops to itself or to its advanced services affiliate or any other party, at any other central office within its system for any type of service.

Moreover, it does not matter whether the loops the incumbent provides to itself or others at another point of its network have been "conditioned" by removal of loading coils, bridged taps and other electronic impediments, or whether such loops never had such impediments in the first place and thus did not require conditioning. As long as the incumbent provides itself, or any subsidiary or affiliate or third party, at any part of its network, loops that *could* be used to transmit the digital signals needed to provide advanced services, the incumbent's nondiscrimination obligation requires it to provide such loops to any requesting carrier at any other point of the network. The Commission should clarify that the incumbent's obligation applies regardless of whether the loops it provides itself (or its subsidiary, affiliate or third party) elsewhere in its network are *actually* used for advanced services. The unbundling obligation is not applied on a service-by-service basis, so it is irrelevant whether the loops are used by the

incumbent for xDSL or for something else. The incumbent's obligation under section 251(c)(3) focuses on the network elements it is required to provide, and applies even if the competing carrier intends to utilize these elements to provide new services.

That conclusion follows from the Eighth Circuit's decision in Iowa Utilities Board. The Eighth Circuit relied on the language of section 251(c)(2), requiring the incumbent to provide interconnection "at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection." While this language explicitly applies only to interconnection, the Eighth Circuit concluded that access to unbundled network elements is also implicitly subject to the "at least equal in quality" test. Iowa Utilities Board, 120 F.3d at 813. Under this test, where the incumbent provides conditioned loops to itself or to an affiliate or subsidiary or third party at *any* part of its network, it must accede to a request for conditioned loops at any other technically feasible site chosen by a competing carrier, in order to comply with its obligation to provide access "at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party . . . ."

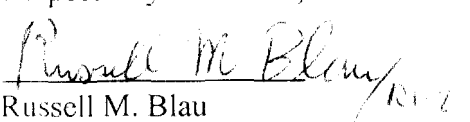
The incumbent would have such an obligation even if the "at least equal in quality" test had not been read into section 251(c)(3) by the Eighth Circuit. Section 251(c)(3) requires incumbents to provide "nondiscriminatory access" to network elements; and it would be clear discrimination if the incumbent provided conditioned loops to itself, or to a subsidiary or affiliate or third party, at locations of its own choosing, while refusing conditioned loops at another technically feasible location chosen by a competing carrier requesting access.

The Commission should also require that if the incumbent refuses a competing carrier's request for conditioned loops on grounds other than technical feasibility, it must provide the requesting carrier a certification, with a copy to the State commission, that it does not and has not provided, at any point on its network, loops that could be used for advanced services to itself or to any subsidiary, affiliate or any other party to which it provides interconnection or access to network elements. In addition, the incumbent should be required to notify the competing carrier if at any time in the future it provides such loops to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection or unbundled access. Such a requirement would be well within the Commission's authority under section 251(d)(1) to adopt regulations to implement the nondiscrimination requirement of section 251(c)(3).

CONCLUSION

The petitions for rehearing should be denied.

Respectfully submitted,



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October 5, 1998

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CERTIFICATE OF SERVICE

I, Teri Lee Amaya, hereby certify that on this 5th day of October 1998, copies of the foregoing Opposition of Hyprion Telecommunications, Inc. were hand delivered to those parties marked with an asterisk. All others were served by first class mail.

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